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IN THE

# UNITED STATES SUPREME COURT

OCTOBER TERM, 1968

NO. 618

ALABAMA POWER COMPANY,
*Petitioner,*

v.

ALABAMA ELECTRIC COOPERATIVE, INC., a corporation; RURAL ELECTRIFICATION ADMINISTRATION; NORMAN M. CLAPP, Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE; and ORVILLE L. FREEMAN, Secretary of the United States Department of Agriculture,
*Respondents.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Two briefs have been filed in opposition to the petition for the writ of certiorari sought herein.

The brief on behalf of respondents Rural Electrification Administration, Norman M. Clapp, United States Department of Agriculture and Orville L. Freeman (hereinafter referred to as the government's brief) embraces an attempt to restate in the form of a single question (p. 2) the questions presented to this Court and in so doing the government's brief fails to focus on the several questions actually presented by this petition for writ

of certiorari. Thus the question as stated by the government's brief skirts the important question as to whether petitioner has standing under Section 16 of the Clayton Act (15 U.S.C. § 26) to sue Alabama Electric Cooperative, Inc. (a private, non-Governmental party) to enjoin its violations of the federal antitrust law by entering into the 35-year, all-requirements contracts. Moreover, the government's brief does not even cite, much less attempt to explain why such section does not confer upon petitioner standing to maintain the suit filed in the District Court below. Likewise, the government's brief passes over other questions put to the court by the petition for writ of certiorari and contains a too selective statement of facts which neatly sets the stage for the government's argument but fails fairly to put the facts in perspective. Thus, the government's brief, in characterizing the respondent, Alabama Electric Cooperative, Inc., as a federated cooperative "composed primarily of several member distribution cooperatives" which will distribute power to "consumers in rural areas of Alabama," fails to disclose (a) that such Cooperative at the time of making the contracts complained of was serving at wholesale six municipalities, each with considerably more than 1,500 inhabitants, and two large textile plants located in one of such municipalities (R. 93, 130, 131, 132) and (b) that the generating plant and more than 700 miles of high voltage transmission lines to be constructed with the $20,350,000 loan from the Rural Electrification Administration (REA) *were not* to be used to extend service to persons "in rural areas who are not receiving central station service," but that such facilities *were* to be used to displace existing "central station service"

being supplied at reasonable rates[1] by petitioner in Alabama and Gulf Power Company in Florida (R. 7, 8, 131, 252, 253, 271, 272, 273, 288).

The statement in the government's brief also fails to point up the ambitious expansion plan adopted by Alabama Electric Cooperative, Inc., to extend its facilities to the greater portion of the State of Alabama and northwest Florida in duplication of existing facilities of petitioner and Gulf Power Company and that the 35-year, all-requirements contracts constitute the device to assure a market for the power to be delivered from such facilities (R. 12, 20, 292, 293, 294, 296, 297, 298). In particular, such statement fails to recognize the allegations in petitioner's complaint to the District Court below that the facilities to be constructed with the $20,350,000 loan are merely the first step in a long-range plan to take over and duplicate service now being rendered by petitioner to wholesale customers located throughout the State of Alabama (R. 293).

The brief filed on behalf of respondent Alabama Electric Cooperative, Inc., (p. 9) draws on statistical data contained in

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[1] See *Alabama Electric Cooperative, Inc. v. Alabama Power Company*, Federal Power Commission Opinion No. 533, Docket No. E-7183, November 8, 1967, 71 P.U.R. 3d 209, 216, where the Commission found petitioner's uniform wholesale rates to electric cooperatives which return less than 6 per cent *not* to be unreasonable. Also see transcript of Hearings before Agriculture Subcommittee, Department of Agriculture Appropriations for 1969, House Committee on Appropriations, 90th Cong. 2d Sess., pp. 424-427, where it was shown that the rates of Alabama Electric Cooperative, Inc., to the distribution cooperatives it serves are 50 per cent higher than the rates (approximately 6 mills per kilowatt hour) from petitioner. There it was also shown that Alabama Electric Cooperative, Inc., with REA approval, was in the process of giving its wholesale customers a 10 per cent reduction in rates as the result of an arrangement (a) whereby REA granted a moratorium on principal and interest payments on its REA loan and (b) certain distribution cooperatives which purchase their power requirements from petitioner will contribute to Alabama Electric Cooperative, Inc., one-half mill per kilowatt hour on all power purchased by them from petitioner.

the records of the Federal Power Commission and filings with the Securities and Exchange Commission to point up the relative sizes of petitioner and such Cooperative and paints a picture (not borne out by the record) of petitioner as a large, overpowering utility which has sought to "imperil the stability and to stifle the growth of Alabama Electric Cooperative, Inc.," (p. 1). The brief of Alabama Electric Cooperative, Inc., makes further excursions outside the record and charges (p. 8) that "[i]t is well known that, from the outset of the REA program, the generation and transmission loans made by REA have been the subject of vigorous, hostile attacks by investor-owned power companies" and concludes that cooperatives should not be required to "face the prospect of treble damage suits" because of the heavy burden the defense of such suits would be to the cooperatives. We are sure this court will be surprised to hear that the antitrust laws should not be enforced because enforcement would create a burden for those who violate the laws. We believe the injuction and treble-damage provisions as well as the criminal provisions of the antitrust laws were *intended* to create a burden on those who would violate such laws. We also suspect that this court will be surprised to hear that one charged with a violation of these laws is to be excused because the complaining petitioner is larger and more powerful.[2] Standing to sue under Section 16 of the Clayton Act does not depend upon the relative size of the complainant.

The brief of Alabama Electric Cooperative, Inc. (pp. 9, 10), purports to trace the history of litigation before the Alabama State Department of Finance and the state court review of that

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[2] Yet even the brief of the government (footnote 9, page 10) points up the vast amount of loans (approximately one billion dollars) made by REA to federated cooperatives such as AEC.

agency's action in approving the $20,350,000 loan. However, it fails to disclose that the Alabama Supreme Court, like the District Court and the Fifth Circuit below, declined to pass on the validity of the REA loan (R. 192). The antitrust question presented here was not raised in the state litigation. In any event, the attempt by petitioner to exhaust its other administrative and judicial remedies is no reason to deny its standing to sue in the federal courts for enforcement of rights afforded it under the antitrust laws.

The argument submitted by petitioner along with its petition for writ of certiorari (pp. 24-30) states the basis for petitioner's reliance on *Hardin v. Kentucky Utilities Company*, 390 U.S. 1, 19 L.Ed.2d 787. Neither of the briefs filed in opposition to the petition herein shows why the doctrine applied by this Court in *Hardin* should not be applied in this case. Both of such briefs rely upon the footnote reference (Note 7) by this Court in *Hardin* to *Kansas City Power & Light Company v. McKay*, 96 U.S. App. D.C. 273, 225 F.2d 924 (C.A. D.C. Cir.), cert. denied, 350 U.S. 884, 100 L.ed. 780, 76 S.Ct. 137 (1955) as supporting their position; however, this Court clearly pointed out in *Hardin* that the government's reliance on Kansas City was "misplaced." In *Hardin*, just as in this case, the standing to sue was predicated on a statute concerned with "protecting competitive interests" and this Court held that in such a case the "long established rule" is that an "explicit statutory provision" was not necessary to confer standing. However, here petitioner relies not only upon the substantive provisions of the antitrust statute which are designed to protect competitors, but also Section 16 of the Clayton Act which expressly authorizes the suit initiated in the District Court below. Moreover, while this Court did decline to grant the petition for writ of certiorari in *Kansas City*, this

Court has never held that the "central station service limitation" contained in Section 4 of the Rural Electrification Act of 1936, 7 U.S.C. 904, was not also designed to protect the competitive interest of existing electric suppliers. In any event, the REA Administrator could not be taking "valid Governmental action" if he were failing to comply with the central station service limitation.

The reliance by the opposition briefs on *Parker v. Brown*, 317 U.S. 341, is likewise misplaced. The quote in the government's brief (p. 5) from *Parker* points up that this Court held there that nothing in the language of the Sherman Act or in its history suggests that its purpose was to restrain a state or its officers or agents from "activities directed by its legislature." Petitioner here contends that the activities of the respondents in this case were *not* directed by any legislature but, on the contrary, are in violation of the legislative directions.

With respect to *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127, 136 (1961), relied on by respondents and discussed on page 32 of the petition herein, this Court will note the many significant distinguishing features of that case from the one here and note in particular that in this case the complainant alleges trade restraints by individuals and further that the participation by the governmental defendants in the restraint of trade involved is not the result of valid governmental action.

## CONCLUSION

For the reasons set forth in the petition for a writ of certiorari, such petition should be granted.

Respectfully submitted,

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